SEARCH AND SEIZURE: "Anticipatory" or "prospective" search warrants and "controlled deliveries"……..Revised 12/2009

"Anticipatory" or "prospective" search warrants are constitutional when they are based on sufficient evidence that the defendant is *currently* committing a crime and/or that evidence of the crime will in the near future be found at the place described in the warrant. *See State v. Cox*, 110 Ariz. 603 (1974). An anticipatory warrant is invalid if the only evidence of probable cause is the very evidence that the government's agents will be providing to the suspect through a "controlled delivery." *See State v. Crowley*, 202 Ariz. 80 (App. 2002).

A.R.S. § 13-3913 states the conditions that must be met before any search warrant may be issued in Arizona:

> No search warrant shall be issued except upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched.

In other words, before a magistrate may ordinarily issue a search warrant, the magistrate must find that, *at the time the warrant is issued*, there is probable cause to believe that evidence of a crime exists *at that time* at the place described in the warrant. See A.R.S. § 13-3912(2), (4).

However, Arizona law allows issuance of an "anticipatory" or "prospective" search warrant, "based upon an affidavit showing probable cause that *at some future time* (but not presently) certain evidence of crime will be located at a specified place." *State v. Crowley*, 202 Ariz. 80, 84, ¶ 10, fn. 3, 41 P.3d 618, 622, fn. 3 (App. 2002) [emphasis added], *quoting* 2 Wayne R. LaFave, *Search and Seizure* § 307(c) at 362 (3d ed. 1996).

The "future time" for the prospective warrant to be served must be within a reasonably short time after the warrant is issued. Prospective warrants are properly issued "to be served at some time not unreasonably distant for a crime … that is in progress or it is reasonable to assume will be committed in the near future." *State v. Cox*, 110 Ariz. 603, 608, 522 P.2d 29, 34 (1974). For example, in *Mehrens v. State*, 138 Ariz. 458, 675 P.2d 718 (App. 1983), the State learned that a defendant had given his attorney some incriminating letters and had a subpoena duces tecum issued ordering the attorney to turn over the letters. The attorney refused to comply, claiming attorney-client privilege. The trial court quashed the subpoena and had the attorney turn the letters over to the court pending further litigation. After the higher courts ruled that the attorney could not be compelled to produce the letters by subpoena duces tecum, the trial court ordered the attorney to pick up the letters before 9 a.m. on a particular date. The State obtained a search warrant to search the attorney for the letters that morning after he left the court. The attorney argued that "the search warrant was invalid because there was no probable cause to believe the letters were in his possession at the time the warrant was issued." *Mehrens*, 138 Ariz. at 461, 675 P.2d at 721. The Court of Appeals found no error, stating that the prospective warrant was valid because the affidavit supporting the warrant showed "that the right to search will exist within a reasonable time in the future." *Mehrens*, *id*. The *Mehrens* Court found the warrant sufficient, but said that "the better practice is for the warrant to provide that execution of the warrant will not occur until the happening of a specified event." *Mehrens*, 138 Ariz. at 458, 675 P.2d at 721.

Fact scenarios involving anticipatory warrants often involve "controlled deliveries" to a suspect by police agents. *See Crowley, supra*, and *Illinois v. Andreas,* 463 U.S. 765 (1983). Such cases usually involve packages of contraband addressed to a suspect and sent by mail or a private shipping carrier. Such packages may be intercepted by the package carrier or the police for one reason or another – for example, an agent of the carrier may smell the odor of marijuana coming from a box, or the package may have been damaged in transit, revealing its contents to be contraband. Agents of the carrier may have suspicions and open a package before calling police, or may contact the police with their concerns. If the carrier opens the package, its contents may be observed to be contraband; if not, a trained police dog may "alert" to the package, or other evidence may give the police sufficient probable cause for the police to obtain a warrant to open the package. If the package proves to contain contraband, the police may remove some of the contents, or spray the contents with a powder that is only visible under black light, or install a device that will trigger a remote alarm when the package is reopened. Then the police rewrap the package and arrange to have a "controlled delivery" made to the suspect, often by a police officer disguised as a delivery person, planning to arrest the suspect after delivery is made. The delivery of the package to the suspect is the "triggering event" for execution of the anticipatory warrant. Such a warrant ordinarily authorizes not just a search of the package itself, but also a search of the residence or other location where the suspect receives the package and the suspect's person where contraband might be concealed. In other words, the package delivery location (usually the suspect's home) is the target location for the search.

For a prospective warrant to be valid, there must be evidence *at the time the warrant is issued* that evidence of a crime *will be* found at the location described in the warrant. In *State v. Crowley*, 202 Ariz. 80, 41 P.3d 618 (App. 2002), a "controlled delivery" case, customs officials intercepted a package addressed to Crowley mailed from the Netherlands after a trained police dog "alerted" to it. A postal examiner opened the package, finding illegal drugs. After confirming that Crowley lived at the address listed on the package, a police officer informed a magistrate of the circumstances, said that he would deliver the package to Crowley that day, and obtained a search warrant to be executed the following day. The warrant authorized police to search Crowley's residence for the package and any other evidence relating to illegal drugs. Notably, there was no evidence that Crowley had expected the package; no evidence that he had mailed it to himself; and no evidence other than the package that Crowley was involved with illegal drugs in any way. The officers put an electronic device in the package that would signal them when the package was opened. They attempted to deliver the package to Crowley on the day specified in the warrant, but no one was there. An undercover officer eventually delivered the package three days later; Crowley accepted it but put it on a shelf and did not open it. The police executed the warrant about an hour later and found the unopened package, and also found drug paraphernalia and drugs. Crowley filed a motion to suppress all the evidence and the trial court granted the motion to suppress, relying on *State v. Berge*, 130 Ariz. 135, 634 P.2d 947 (1981). The State appealed but the Court of Appeals affirmed, finding that *Berge* was still good law. The Court noted that in "controlled delivery" cases like this, "Certainly, the contraband will be found if law enforcement officers have arranged for its

presence." *Crowley*, 202 Ariz. at 86, ¶ 14, 41 P.3d at 624. The Court noted that there was no evidence, except for the package itself, that Crowley was doing anything illegal, and further noted "the possibility for mischief" that would exist if the mere mailing of a package of contraband to an unknowing recipient could justify a search warrant. *Id*. at ¶ 20.

In *State v. Berge*, 130 Ariz. 135, 634 P.2d 947 (1981), an informant told police that someone from Atlanta was sending the defendant packages of marijuana via UPS for the defendant to sell in Phoenix. After a drug-sniffing dog alerted on a package addressed to the defendant and bearing an Atlanta return address, police obtained a search warrant and opened the package, finding marijuana and $275 in cash. The police sprayed the package and its contents with a powder that fluoresced under black light, rewrapped the package, and arranged for an officer disguised as a UPS deliveryman to deliver it to the defendant. The police obtained a second search warrant to search the defendant's person and residence after the package was delivered. The defendant accepted delivery of the package but drove away before the police could execute the second warrant. The police entered the residence on the second warrant. They did not find the package, but found marijuana and paraphernalia. The defendant returned shortly thereafter. The police arrested him and found marijuana and $275 in cash on him; the cash and his hands showed the fluorescent powder under black light. The defendant moved to suppress all the evidence seized from his residence and person, arguing that the prospective warrant was invalid. *Berge*, 130 Ariz. at 136, 634 P.2d at 948. The Arizona Supreme Court agreed, noting:

> The package, which was the basis for the warrant, was in the possession or control of the police at the time the affidavit was sworn to

> and the warrant issued. There was no crime as such being committed at that time. What defendant did with the package after he received it would determine the extent of his criminal liability. We do not believe that it is reasonable to base a warrant upon future acts that can only come into being by actions of the persons seeking the warrant.

Berge, *id*. at 137, 634 P.2d at 949. Thus, the warrant in *Berge* was invalid because at the time the warrant was issued, the police had no knowledge of any illegal activity at the defendant's address.

Similarly, in *State v. Vitale*, 23 Ariz. App. 37, 530 P.2d 394 (App. 1975), an informant told police that on several occasions in the past, he had sold stolen property to a suspect at the suspect's pawnshop and that the suspect knew the property was stolen. The informant agreed to try to sell a stolen TV set to the suspect at the pawnshop. The officers obtained a search warrant to search the pawnshop and went there while the informant sold the TV to the suspect, telling him it was stolen. The officers then executed the search warrant and seized the TV. The suspect moved to suppress the TV set because it was seized on a prospective warrant. The Court of Appeals held that the warrant was invalid, not simply because it was prospective, but rather because at the time the warrant was issued, "there was no probable cause to believe a crime had been committed." *Vitale*, 23 Ariz. App. at 40, 530 P.2d at 397. The *Vitale* Court reasoned that when the warrant was issued, "no crime was in progress and it was a matter of pure speculation whether one would be committed in the future." *Id*. at 41, 530 P.2d at 398. Therefore, the warrant was invalid.[1]

[1] Nevertheless, the *Vitale* Court held that the TV was properly admitted into evidence because it was seized incident to the defendant's arrest.